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Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *A library recently purchased a PDF-only toolkit/manual which had no licensing or other restrictions. Do other institutions print PDFs and make them available for check out, or is access provided to the PDF file from the integrated library system (ILS)? What are the copyright considerations for making the toolkit/manual available?*

ANSWER: It is somewhat unusual that an electronic version of toolkit or manual would not be accompanied with a license agreement, but assuming that this is the case, then printing the manual and adding it to the collection should be no problem. Providing access to the PDF file from the ILS is something that typically would be covered in a license agreement, but since there is no license provision to the contrary, there is nothing to prevent the library from making the PDF file available from the ILS.

QUESTION: *A faculty member is involved in investigating the Brown Mountain Lights, a little understood atmospheric phenomenon in a mountainous area of North Carolina. A student, and an off-and-on member of the investigation group, presented a poster on the work in a state-wide student research venue and for the campus Research Day. The poster included a photograph taken by a member of the group who is a professional photographer. It is unclear whether the student obtained permission to display the image. The actual image was published in the "Charlotte Observer," both in print and online, with the photographer's copyright ownership indicated. The student apparently took the image from the newspaper site to use on her poster because the photographer says that he never provided a copy to her.*

The photographer has complained to the faculty member that the student used the photograph and insisted that the group and the college destroy the poster. No one profited by including the image in an academic, "free," one-off "publication." The faculty member finds it preposterous that a member of the investigation group would make such a complaint, but the photographer has never shared this or his other images with the group beyond letting members view them on his laptop. Is the use of the photograph as described fair use?

ANSWER: First, it would be the student who has any liability and not the investigation group or the college. If the student obtained permission, and if she retained the email or permission correspondence, that would be the end of the complaint.

Absent permission to use the photo, the display of the image on the poster may be fair use. Applying the fair use factors: (1) the purpose is definitely nonprofit scholarship and research (favors the student); (2) nature of the work is a creative work (favors the photographer); (3) the amount and substantiality used — she used

100% of the work (favors the photographer); (4) market effect — zero (favors the student). As described, this is a "one-up," not a publication, but instead is a display (favors the student). Thus, use on the poster may well be a fair use, but only a court can determine this authoritatively.

It is unlikely that the photographer would actually sue the student because litigation is very expensive and there is little chance of a significant monetary recovery from the student. Sometimes, however, there are other issues that might lead the group to remove the poster such as the public relations issue with the photographer. As a member of the group, it seems that he would have permitted use on the poster; however, he has objected. Perhaps an apology from the student would be enough if she did not get permission. Or, the group could simply take a stand and declare that it believes the use to be fair use and refuse to remove the poster.

QUESTION: *A state library is considering digitizing county history books published by individual counties in the state. One book in particular has stumped the librarians. It was published in 1974 and contains no copyright notice. The library checked the Copyright Office's online records for 1978 and 1979 and there was no registration record for the book. Unfortunately, determining whether the book was registered between 1974 and 1977 is difficult because of the \$320 fee charged to check the manual records. The library is being pressured to declare that the digitization is fair use and to proceed with the project.*

Here is how the library analyzed the fair use factors. (1) It is not really transforming the work in any way (favors the publisher); (2) The book has facts about the county, but also contains personal stories about the residents of the county (so it is both factual and creative and favors neither party). (3) The entire work would be digitized (favors publisher). (4) The digitization does not decrease the market value because there is no market (favors the library). These books are no longer available and the counties seem to have no interest, time, or any inclination to reprint them. The only market seems to be people in the county (or their descendants) and local history buffs. Therefore, the library would be increasing the market by digitizing and making available a book that is hard to obtain (favors the library). Would the last factor be sufficient to overcome the other two factors that favor the publisher?

ANSWER: If the 1974 book contains no notice of copyright, then the work is probably in the public domain and the library is free to digitize it. Notice of copyright was required in the United States until March 1, 1989. There is

some chance that the author corrected the lack of notice, but it is unlikely based on the description of the book and the publisher.

Assuming that the work is still under copyright, and even if the lack of notice was corrected, it is possible that digitizing the work would be a fair use. The library's analysis of the fair use factors seems accurate except that the fourth factor does not mean that works that are out of print have no market, but just that it is less likely that there will be a market effect. Even if the library's analysis indicates that the digitization is not fair use, it may well be worth taking

whatever small risk there is to digitize the work and make it available to the public.

QUESTION: *Libraries are being asked to lend materials from their collections for exhibit in other libraries. This phenomenon is new in libraries although museums have been lending items to other institutions for years. What are the copyright considerations involved when a library permits some of the works it owns to be placed on exhibit in another library?*

ANSWER: There are many considerations when a library lends materials for exhibit in another institution. In fact, the **Association for Library Collections and Technical Services** recently offered a virtual preconference on this issue. See <http://www.ala.org/alcts/events/ala/ac/loans>. The issues involve contractual matters, security of the items lent, insurance, preservation, and others. Libraries should look to their museum compatriots to identify all of the important issues that must be addressed before lending a work to another library for exhibit. There are also copyright considerations for works that are still under copyright.

Section 109(a) of the **Copyright Act** contains the first sale doctrine which permits libraries to lend items from its collections. Further, the borrowing library may display the work under section 109(c) which states that "The owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located." This means that a library may lend items from its collection for public display without being concerned that the exhibit will infringe the copyright in any title that it lends and that the borrowing library is free to display that copy of the work. Should the exhibiting institution reproduce a borrowed work (for example, in a poster, advertising flyer or brochure), the exhibiting library would be liable for any infringement of the reproduction and not the lending institution. 🌿

